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SARA B. THOMAS
State Appellate Public Defender
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SHAWN F. WILKERSON
Deputy State Appellate Public Defender
I.S.B. #8210
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JONATHAN ROSS MATHEWS, Defendant-Appellant.	NO. 40530 TWIN FALLS COUNTY NO. CR 2012-6840 APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

STATEMENT OF THE CASE

Nature of the Case

Mr. Mathews requests that this Court grant review in this matter, which relates to the Idaho Court of Appeals Opinion in *State v. Mathews*, Docket Number 40503, 2013 Unpublished Opinion No. 754 (November 19, 2013) ("Opinion"). In the Opinion, a unanimous panel of the Court of Appeals held that there was reasonable suspicion to extend a stop for a traffic violation in order to provide time for a drug dog to arrive at the scene.

Mr. Mathews argues that both the district court's and the Court of Appeals' determinations that there was reasonable suspicion to extend the stop is contrary to legal authority established by this Court in *State v. Morgan*, 154 Idaho 109 (2013), where this Court held that a travel route alone is not suspicious unless the police officer is aware of particularized facts which establish that the travel route is suspicious. In this case, Officer Bingham assumed, without any facts, that Mr. Mathews was traveling in Idaho to avoid a successful drug interdiction route through the State of Utah. However, Officer Bingham's belief that Mr. Mathews was in Idaho to avoid a section of Interstate 80 in Utah, was not supported by any facts, a conclusion that directly contradicts the holding from *Morgan*.

Even more troubling, and a reason for this Court to grant review, is the Court of Appeals' holding that a lack of an explanation for Mr. Mathews' presence in Idaho reasonably functioned as the basis for Officer Bingham's belief that he was in Idaho to avoid a section of Interstate 80 in Utah. This runs afoul of the requirement that reasonable suspicion be based on articulable facts, because the holding allows for the absence of a fact to be the basis for establishing an affirmative fact. In other words, Officer Bingham failed to ask Mr. Mathews why he was in Idaho, Officer Bingham then made up his own explanation for Mr. Mathews' presence in Idaho, and the Court of Appeals held that since Mr. Mathews did not provide an explanation for his presence in Idaho, Officer Bingham's belief that he was in Idaho to avoid a section of interstate highway in Utah was somehow supported by articulable facts. This eviscerates the requirement that reasonable suspicion be based on articulable facts and undermines the premise that warrantless searches and seizures are *per se* unreasonable.

This Court should also grant review because many of the factors relied on by the district court and the Court of Appeals to determine that reasonable suspicion existed to extend the stop are factors which have been determined to be those associated with innocent non-suspicious behavior. For example, both courts found that Mr. Mathews' calm behavior and decision to look Officer Bingham in the eyes when asked if he was in the possession of controlled substances was suspicious. This conclusion runs contrary to numerous cases which hold that nervous behavior and actively averting eye contact with law enforcement is suspicious. As such, the district court and the Court of Appeals have unhinged reasonable suspicion determinations from prior legal authority and allow officers to make up reasons to seize people in order to search for evidence of criminal activity.

Statement of the Facts & Course of Proceedings

Officer Bingham pulled Mr. Mathews over for speeding. (R., p.9.) Officer Bingham asked Mr. Mathews to provide him his driver's license, registration, and proof of insurance. (R., p.9.) While Mr. Mathews was collecting these materials, Officer Bingham asked him where "he was coming from and going to." (R., p.9.) Mr. Mathews told Officer Bingham that he had driven from Kansas to Reno Nevada to gamble, and that he was on his return trip to Kansas. (R., p.9.) Mr. Mathews then told Officer Bingham that his proof of insurance was outdated and he continued to look for current proof of insurance. (R., p.76.)

Officer Bingham and Mr. Mathews continued to converse while Mr. Mathews was looking for current proof of insurance. (R., p.76.) Mr. Mathews then told the Officer that he had spent the night in a hotel in Reno and gambled in a gas station and that he also

gambled at another establishment. (R., p.9.) Mr. Mathews then said he planned to drive from Idaho to Wyoming, then to Nebraska on his way home to Kansas. (R., p.9.) Officer Bingham asked Mr. Mathews if he had any marijuana, methamphetamine, or cocaine in his vehicle. (R., p.9.) Mr. Mathews removed his sunglasses, looked Officer Bingham in the eye, and stated that he did not have any of the foregoing substances. (R., p.9.)

During this conversation, Officer Bingham noticed that Mr. Mathews had empty energy drink containers and food wrappers on the seat and floor of his car. (R., p.9.) Officer Bingham also noticed an atlas on the passenger's seat opened to the State of Idaho. (R., p.9.)

After Mr. Mathews provided Officer Bingham his license, registration, and proof of insurance, Officer Bingham returned to his vehicle. (R., p.78.) Based on the foregoing information, Officer Bingham testified that at that point he abandoned the original reason for the stop and started an investigation for drug activity. (R., p.78; Tr., p.98, L.1 - p.99, L.1.) Officer Bingham started making phone calls to locate a canine officer. (R., pp.78-79.) A canine officer was eventually located and over sixteen minutes after abandoning the original reason for the stop, the drug dog alerted. (R., pp.9-10, 78-79.) A subsequent search of Mr. Mathews' trunk revealed over twenty-four pounds of marijuana. (R., p.10.)

Mr. Mathews was charged, by information, with trafficking in marijuana. (R., pp.29-30.) Mr. Mathews filed a motion to suppress based on a theory that Officer Bingham unreasonably extended the stop to afford the drug dog time to arrive at the scene. (R., pp.52-56.) The district court denied the motion to suppress because it

determined that the following four factors established reasonable suspicion that Mr. Mathews was engaging in a drug related activity. (R., pp.67, 74-88.) First, Mr. Mathews' travel plans "were suspect" as he was not taking a direct route back to Kansas. (R., pp.84-85.) Second, Mr. Mathews took his sunglasses off and calmly looked into Officer Bingham's eyes when he denied having any contraband in his vehicle. (R., p.85.) Third, the food wrappers and energy drinks created a "lived in" appearance in the car. (R., p.84.) Fourth, Mr. Mathews was relying on a paper atlas as opposed to an electronic GPS system. (R., p.84.)

There were various factors which were not discussed by the district court which weighed in favor of Mr. Mathews. Officer Bingham testified that Mr. Mathews did not appear to be under the influence of controlled substances. (Tr., p.78, Ls.12-15.) In fact, Officer Bingham testified that the thought that Mr. Mathews might have been under the influence of a controlled substance never even crossed his mind. (Tr., p.78, Ls.16-22.) Officer Bingham never testified that Mr. Mathews was not coming from or going to a location associated with drug use or sales. Officer Bingham did not receive a tip that Mr. Mathews was trafficking or using drugs. According to trial counsel, there was no "drug activity tip, [no] bloodshot eyes, [and no] fumbling for paperwork." (Tr., p.133, Ls.15-22.) The main reason Officer Bingham guessed that Mr. Mathews might be engaging in illegal activity was his personal belief that Mr. Mathews should have been taking a direct route back to Kansas.

Mr. Mathews pleaded guilty to trafficking in marijuana and preserved his ability to challenge the denial of his motion to suppress on appeal. (R., pp.113-114, 121, 124-

125.) Thereafter, the district court imposed a unified sentence of twelve years, with three years fixed. (R., pp.133-138.) Mr. Mathews timely appealed. (R., pp.140-143.)

On appeal, the Court of Appeals did not consider whether the existence of energy drinks and food wrappers contributed to reasonable suspicion that Mr. Mathews was engaged in the transportation of drugs. (Opinion, p.5.) In determining that reasonable suspicion existed to extend the stop, the Court of Appeals considered the fact that Mr. Mathews calmly looked the officer in the eyes when he denied the possession of contraband. (Opinion, pp.5-6.) The Court of Appeals also considered Mr. Mathews' circuitous travel route, explanation of gambling in Nevada, and the existence of a paper map as opposed to an electronic GPS system. (Opinion, pp.6-7.)

ISSUE

Should review be granted, as the Idaho Court of Appeals' Opinion affirming Mr. Mathews' Judgment of Conviction is inconsistent with a prior Idaho Supreme Court Opinion and prior Idaho Court of Appeals Opinion?

ARGUMENT

Review Should Be Granted As The Idaho Court of Appeals' Opinion Affirming Mr. Mathews' Judgment Of Conviction Is Inconsistent With A Prior Idaho Supreme Court Opinion And Prior Idaho Court Of Appeals Opinion

A. Introduction

This Court should grant review because the holding in the Opinion is inconsistent with this Court's holding in *State v. Morgan*, 154 Idaho 109, 112 (2013), where this Court held that Morgan's decision to make four left hand turns and a police officer's belief that this travel pattern was a means to avoid law enforcement did not objectively establish a reasonable suspicion that crime was afoot. In this case, Officer Bingham determined that Mr. Mathews' decision to take a circuitous route through Idaho was suspicious because an interstate corridor in Utah provided Mr. Mathews a more direct route to his final destination and Officer Bingham had recently learned that the route through Utah was an area know for drug trafficking.

The district court and the Court of Appeals both agreed that this was suspicious. However, both courts' determinations run afoul the holding in *Morgan* because Mr. Mathews provided Officer Bingham with no specific facts as to the reason why he was in Idaho. In other words, Officer Bingham's determination that Mr. Mathews' presence in Idaho was suspicious was based on Officer Bingham's beliefs and not based on any particularized facts indicating that Mr. Mathews' presence in Idaho was a means to avoid a specific section of an interstate highway in Utah.

The Court of Appeals went on to hold that, since there was no affirmative explanation for Mr. Mathews' presence in Idaho, it was reasonable for the district court to conclude that he was in Idaho to avoid driving through a section of interstate highway

in Utah. This turns the requirement that reasonable suspicion be based on articulable facts on its head and results in a holding that the lack of facts can be the basis for a legal determination that reasonable suspicion exists.

Additionally, this Court should accept review because the district court's and the Court of Appeals' determinations that factors such as a calm demeanor and presence in a low crime area were suspicious, run afoul of various cases which hold that such factors are inherently not suspicious.

B. Standards

The Idaho Appellate Rules provide that petitions for review may be granted only "when there are special and important reasons" for doing so, but, ultimately, the decision of whether to grant a given petition lies within the sound discretion of the Supreme Court. I.A.R. 118(b). This exercise of discretion is not completely unfettered though. Rule 118(b) provides a non-exhaustive list of five factors which must be considered in evaluating any petition for review:

1) Whether the Court of Appeals has decided an issue of first impression;

2) Whether the Court of Appeals' decision is inconsistent with precedent from the Idaho Supreme Court or the United States Supreme Court;

3) Whether the Court of Appeals' decision is inconsistent with its own prior decisions;

4) Whether the Court of Appeals' actions are so unusual as to call for the Supreme Courts' exercise of its supervisory authority; and

5) Whether a majority of the Court of Appeals has certified that further appellate review is desirable.

I.A.R. 118(b). Mr. Mathews argues that this Court should grant review because the district court's order denying the motion to suppress and Court of Appeals' Opinion are both inconsistent with precedent from this Court and the Court of Appeals.

Idaho appellate courts apply a bifurcated standard of review upon a challenge to a trial court's ruling on a motion to suppress. First, an appellate court defers to the district court's findings of fact unless those findings are clearly erroneous. *See, e.g., State v. Willoughby*, 147 Idaho 482, 485 (2009). An appellate court also gives deference to any implicit findings of fact that are supported by substantial and competent evidence. *State v. Frank*, 133 Idaho 364, 367 (Ct. App. 1999). Second, an appellate court reviews *de novo* the trial court's application of constitutional principles to the facts as found. *Willoughby*, 147 Idaho at 485-486.

C. Review Should Be Granted As The Idaho Court of Appeals' Opinion Affirming Mr. Mathews' Judgment Of Conviction Is Inconsistent With A Prior Idaho Supreme Court Opinion And Prior Idaho Court Of Appeals Opinion

Mr. Mathews does not challenge the district court's factual findings in this appeal. As such, the question for this Court is whether, in light of the facts as found by the district court, the district court erred in denying Mr. Mathews' motion to suppress the State's evidence. Mr. Mathews submits that the district court's ruling denying his motion to suppress was not supported both by the evidence and by governing case law, and that this Court should, therefore, vacate the district court's order denying the motion to suppress.

The Fourth Amendment of the United States Constitution secures to the people the right to be free from unreasonable searches and seizures. *State v. Willoughby*, 147 Idaho 482, 486 (2009). The protections of the Fourth Amendment have been

incorporated to apply to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Bishop*, 146 Idaho 804, 810 (2009).

"When a defendant moves to exclude evidence on the grounds that it was obtained in violation of the Fourth Amendment, the government carries the burden of proving that the search or seizure in question was reasonable." *Id.* at 811. Mr. Mathews recognizes that the United State Supreme Court has abandoned a reflexive exclusionary rule and now focuses on a cost benefit analysis which, among other things, focuses on the flagrancy of police misconduct. *Davis v. U.S.*, 131 S.Ct. 2419, 2427-2429 (2011). Mr. Mathews submits that he meets this standard because, as argued below, Officer Bingham's decision to extend the stop could have been justified had has asked more than general and vague questions about Mr. Mathews' travel plans. And, in some sense has been awarded for his inadequate investigatory techniques. Moreover, Mr. Mathews raised his claims under both the United States Constitution and the Idaho Constitution. (R., p.52.) Pursuant to Idaho CONST. Art. I, § 17, the remedy is suppression of the State's evidence. *State v. Arregui*, 44 Idaho 43 (1927); *State v. Guzman*, 122 Idaho 981 (1992).

Even brief detentions of individuals must meet with the Fourth Amendment's requirement of reasonableness. *Bishop*, 146 Idaho at 810. This means that the detention must be both justified at its inception and reasonably related in scope to the circumstances that originally justified the interference in the first place. *Id.* Limited detentions of individuals may be permissible where there is reasonable, articulable suspicion on the part of the officer that the person detained has committed, or is about to commit, a crime. *Bishop*, 146 Idaho at 811. However, the officer must be able to

point to specific, articulable facts in support of the detention – and this requires more than a mere hunch on the part of the officer or "inchoate and unparticularized suspicion." *Id.* (quoting *Alabama v. White*, 496 U.S. 325, 329 (1990)). The question of whether an officer possessed reasonable, articulable suspicion is evaluated by examining the totality of the circumstances known to the officer at the time of, or before, the detention. *Id.* Moreover, the "scope of the detention must be narrowly tailored to its underlying justification," and the investigative detention cannot last any longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 500 (1983). In fact, an individual "may not be detained even momentarily without reasonable, objective grounds for doing so." *Id.* at 498.

These same standards apply where the detention at issue is a traffic stop. *See, e.g., State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005). While the purpose of a stop is not inevitably fixed at the point of the initiation of the traffic stop and may evolve based upon additional information coming to light, any extension of the detention must be carefully tailored to the underlying justification for the stop. *Id.* at 562-563. "Accordingly, where officers abandon the initial purpose of a routine traffic stop and extend it to allow for a drug dog search, the extension must be justified by a reasonable suspicion that criminal activity is afoot." *State v. Danney*, 153 Idaho 405, 409 (2012). "Suspicion will not be found to be justified if the conduct observed by the officer fell within the broad range of what can be described as normal driving behavior." *State v. Roe*, 140 Idaho 176, 180 (Ct. App. 2004).

In this case, Mr. Mathews does not challenge the validity of the initial stop for speeding. The issue on appeal is further narrowed because Officer Bingham testified

that he abandoned the speeding investigation when he returned to his vehicle. (Tr., p.98, L.1 - p.99, L.1.) In fact, the State conceded that "any delay in regards to the calling of the drug dogs was not done during a time in which [Officer Bingham] was still investigating the speeding ticket." (Tr., p.118, Ls.18-23.) As such, the narrow issue on appeal is whether Officer Bingham had reasonable suspicion to extend the traffic stop in order to provide time for a drug dog to arrive at the scene and search[1] Mr. Mathews' car. Since, Officer Bingham began calling for drug dogs immediately after he returned to his vehicle (R., p.78), the only information relevant to the determination of whether Officer Bingham had reasonable suspicion to begin investigating for drug related activity is the information Officer Bingham obtained during his first contact with Mr. Mathews. This information consists of the communications between Officer Bingham and Officer Bingham's observations of Mr. Mathews' vehicle.

Based on this information, the district court found four general factors which it concluded justified Officer Bingham's decision to expand the purpose of the stop into an investigation for drug activity. However, there were other non-suspicious factors which were not analyzed by the district court which belie the conclusion that reasonable suspicion existed to extend the stop. Officer Bingham did not observe anything on the exterior of Mr. Mathews' car that was suspicious. (Tr., p.86, Ls.6-9.) He did not see anything inside Mr. Mathews' car associated with drugs. (Tr., p.87, L.25 - p.88, L.6.) Officer Bingham did not smell the order of marijuana, which Officer Bingham would have recognized. (Tr., p.87, Ls.19-24.) Officer Bingham didn't think Mr. Mathews was

[1] Mr. Mathews does not contend that the drug dog's sniff was a search within the meaning of the Fourth Amendment.

under the influence of drugs or alcohol. (Tr., p.78, Ls.12-15, p.88, Ls.7-13.) Officer Bingham did not testify that Mr. Mathews was either coming from or going to a drug trafficking destination. (*See generally*, Tr., p.11-p.108.) According to trial counsel, there was no "drug activity tip, [no] bloodshot eyes, [and no] fumbling for paperwork." (Tr., p.133, Ls.15-22, p.86, Ls.1-5.) Officer Bingham testified that throughout their conversation Mr. Mathews was calm, confident, and did not display signs of nervousness. (Tr., p.61, Ls.15-19.)

Additionally, one of, if not the most important, factors ignored by the district court and the Court of Appeals was that Mr. Mathews' was initially pulled over for speeding. (R., p.9.) This is important because three of the four factors relied on by the district court and two of the three factors relied on by the Court of Appeals to hold that there was reasonable suspicion to extend the stop were factors which related to Mr. Mathews' alleged pattern of avoiding law enforcement. Officer Bingham testified that existence of food wrappers, a paper map, and the use of long circuitous routes are suspicious because they are generally consistent with drug traffickers' efforts to avoid interactions with law enforcement. However, reliance on all of those factors for the inference that Mr. Mathews was trying to avoid interaction with law enforcement is belied by the fact that he was pulled over for speeding, which is one of the most likely means by which the average citizen interacts with law enforcement.

Now turning to the factors the district court and the Court of Appeals considered objectively suspicious. The first factor relied on by both courts, Mr. Mathews' stated travel plans, should not be afforded much, if any, weight in the reasonable suspicion

analysis. The district court provided the following explanation supporting its conclusion that Mr. Mathews' travel plans were suspicious:

> When asked where he came from and what he was doing there, [Mr. Mathews] told [Officer Bingham] that he drove cross-country from Kansas to Reno, Nevada, to gamble at a gas station. When [Officer Bingham] asked Mathews where he was headed, [Mr. Mathews] said he was traveling to Kansas from Reno, via Cheyenne and Lincoln. [Officer Bingham] knew that the most direct route from Reno to Cheyenne was on Interstate 80 through Utah - a section of interstate that is well-known for being patrolled for drug trafficking and could compel a trafficker to go far out of his way to avoid detection there.

(R., pp.84-85.) The foregoing analysis was based on Officer Bingham's testimony that he thought Mr. Mathews was intentionally avoiding the stretch of I-80 which goes through Utah to avoid contact with law enforcement. (Tr., p.65, L.10 - p.71, L.18.) The Court of Appeals also thought Mr. Mathews travel plans were suspect because he failed to explain to Officer Bingham why he was in Idaho. (Opinion, p.6.)

The district court's and the Court of Appeals' reliance on Mr. Mathews' travel plans as a factor which supports its conclusion that reasonable suspicion existed to extend the stop runs afoul this Court's recent holding in *State v. Morgan*, 154 Idaho 109 (2013). In that case, a police officer observed Morgan take a series of four left turns. *Id.* at 111. The police officer concluded that Morgan's driving patter was an attempt by Morgan to avoid the officer, so the officer stopped Morgan. *Id.* The Idaho Supreme Court concluded the stop was unreasonable because "the officer provided no factual justification for" his "belief" Morgan was attempting to avoid him. *Id.* at 112. This Court went on to hold that "[a]bsent other circumstances, driving around the block on a Friday night does not rise to the level of specific, articulable facts that justify an investigatory stop." *Id.* In this case, Officer Bingham pulled over Mr. Mathews for speeding and

observed some common items in his car, *i.e.* a map and some garbage, and made assumptions based on his personal belief that Mr. Mathews' was in Idaho to avoid a stretch of Interstate 80 in Utah. Similar to the police officer in Morgan, Officer Bingham did not articulate any fact specific to Mr. Mathews' presence in Idaho to support the conclusion that Mr. Mathews was in Idaho to avoid law enforcement in Utah. On other words, Officer Bingham's determination that Mr. Mathews was in Idaho was based on his "belief" and not facts and is no different than the police officer's belief in *Morgan* that Morgan was trying to avoid him by taking four left hand turns.

What is even more troubling is the Court of Appeals' conclusion that Mr. Mathews' decision to look Officer Bingham in the eye and deny possessing controlled substances combined with failure to provide a reason why he was in Idaho was enough for Officer Bingham to reasonably assume he was in Idaho to avoid a section of Interstate 80 in Utah. The Court of Appeals holding follows:

> While there are numerous innocent explanations for taking a circuitous route, [Mr. Mathews'] answers to the officer's queries neither gave an explanation nor even acknowledged that his location was far off his proclaimed course. This led the officer to suspect that the actual explanation might be that [Mr. Mathews] was avoiding a portion of Interstate 80 because it was known to be a drug interdiction zone. [Mr. Mathews] indirect, unexplained travel route, although not suspicious in isolation, was suspicious when combined with his odd behavior in response to the officer's question about drugs.

(Opinion, p.6 (emphasis added).) According to the Court of Appeals, it was reasonable for Officer Bingham to believe, without any specific facts, that Mr. Mathews' presence in Idaho was suspicious because Mr. Mathews never volunteered a reason for being in Idaho. Again, in *Morgan*, this Court held that reasonable suspicion must be based on articulable facts. If Officer Bingham's suspicions were reasonably piqued by

Mr. Mathews' travel plans, it makes little sense that Officer Bingham did not ask Mr. Mathews why he was in Idaho. During cross-examination, Officer Bingham testified that he never asked Mr. Mathews if he had been to Idaho before. (Tr., p.93, Ls.22-24.) Officer Bingham then testified that he never asked Mr. Mathews if he had been to Twin Falls or if he was going to Twin Falls to watch base jumpers jump off Perrine Bridge, which he agreed is an innocent reason for young people to visit Twin Falls. (Tr., p.93, L.25 - p.94, L.6.) Since Officer Bingham had no idea why Mr. Mathews was in Idaho, his assumption that he was avoiding Utah was merely inchoate and unparticularized and, therefore, not a reasonable basis for the district court's finding Mr. Mathews' presence in Idaho was suspicious. *Morgan*, 154 Idaho at 109; *White*, 496 U.S. at 329. However, the Court of Appeals functionally disregarded that standard and concluded that reasonable suspicion can exist when a suspect fails to affirmatively volunteer a legitimate explanation for travel plans.

Mr. Mathews' position is further supported by the lack of relevance between his travel plans through Idaho and his response to Officer Bingham's incriminating questions. Again, *Morgan* held that suspicion can only be inferred from a travel route if there is something suspicious about that travel route. *Morgan*, 154 Idaho at 112. Here, Mr. Mathews' response to Officer Bingham's question, removing his sunglasses and calmly denying that he was in possession of contraband, has no relevance to Mr. Mathews' travel plans. Had Officer Bingham asked Mr. Mathews why he was in Idaho and Mr. Mathews indicated that he was trying to avoid Utah, he then might have had a fact to support his conclusion that Mr. Mathews was in Idaho to avoid a successful drug interdiction corridor in Utah. Absent such a fact , Mr. Mathews'

presence in Idaho should not have been afforded much, if any, weight in the reasonable suspicion determination because Mr. Mathews' removal of his sunglasses had no bearing on his travel plans in Idaho.

Another problem with this holding is that it also allows for a police officer to manufacture reasonable suspicion by avoiding asking detainees questions about their travel plans. As mentioned, above Officer Bingham could have easily asked Mr. Mathews why he was in Idaho if he was planning to return to Kansas. It is the lack of facts as to the answer of that hypothetical unasked question which the Court of Appeals held was partially the basis for a finding of reasonable suspicion. Thus, the Court of Appeals' holding in this case actually encourages police to engage in vague and general questioning so the police officer can fill in the answers to non-asked questions themselves and use those made up narratives as the basis for reasonable suspicion. Regardless of Officer Bingham's intent in this matter, this is exactly what happened; Officer Bingham asked a few broad questions and without providing Mr. Mathews an opportunity to provide an innocent explanation for his travel route through Idaho and Officer Bingham then assumed that Mr. Mathews was in Idaho to avoid a specific section of interstate highway in Utah.

The courts' reliance on Mr. Mathews' travel plans as a factor to conclude that reasonable suspicion existed to extend the stop also runs contrary Idaho Court of Appeals precedent and, taken to its logical conclusion, would allow a court to find a person's presence suspicious no matter where that person was pulled over. In *Danney*, *supra*, the Court of Appeals held that one of the factors supporting the holding that there was reasonable suspicion to extend a traffic stop in order for a drug dog to

arrive was the fact that Danney was pulled over in an area known for drug trafficking. *Danney*, 153 Idaho at 411; *see also State v. Gibson*, 141 Idaho 277 (Ct. App. 2005) (holding that one's presence in a high-crime area is an appropriate factor to use when determining whether it is reasonable to search for weapons). Here, the district court found that it was suspicious for Mr. Mathews to be present on a roadway which is not well known for drug trafficking. (R., pp.84-85.) Based on this logic, every person that gets pulled over either in an area known for drug trafficking or an area not known for drug trafficking would be considered a potential drug trafficker. Such a finding is patently unreasonable.

The district court and the Court of Appeals also found Mr. Mathews' decision to go to Reno Nevada to gamble at a gas station was somewhat suspicious because he could have gambled at a gas station in eastern Nevada. (R., p.85, n.5; Opinion, pp.6-7.) There could have been totally innocent explanations for Mr. Mathews to gamble in Reno, but Officer Bingham failed to ask enough questions for that fact alone to be suspicious. For example, Mr. Mathews could have had a friends or family that live in Reno. He might have sought a specific place to gamble because it supposedly had a higher win rate than his other options. Mr. Mathews did gamble at more than one establishment. (R., pp.9.) Mr. Mathews might have gambled at the first place lost then got lucky at the gas station and decided to stay there. He might have also wanted to visit Reno because it is "America's Biggest Little City." However, both courts agreed with Officer Bingham and just assumed that Mr. Mathews' reason for gambling in western Nevada was suspicious without any facts indicating the reason he was in western Nevada. Again, this runs afoul *Morgan* because there is no specific fact in the

record which makes Mr. Mathews' presence in western Nevada suspicious and the lack of a non-incriminating explanation for his presence in western Nevada is not an articulable fact which supports either court's reasonable suspicion finding. *Morgan*, 154 Idaho at 109; *White*, 496 U.S. at 329.

The second factor relied on by the district court and the Court of Appeals to determine there was reasonable suspicion to extend the stop was the fact that after Mr. Mathews was asked if he had contraband in his vehicle he calmly, and without any display of nervousness, removed his sunglass, looked Officer Bingham in the eye, and said that he did not have any controlled substances in his car. (R., p.85; Tr., p.61-Ls.12-19.)

The district court's reliance on this as a factor to support a finding of reasonable suspicion and is at odds with the relevant case law. For example, the Idaho Court of Appeals has held that "[n]ervous, evasive behavior is a pertinent factor that may contribute to reasonable suspicion." *State v. Nevarez*, 147 Idaho 470, 475-476 (Ct. App. 2009). Moreover, in *State v. Troughton*, 126 Idaho 406 (Ct. App. 1994), the Court of Appeals held the fact that the defendant hid his face while speaking with an officer was a factor which objectively supported the conclusion that the officer had reasonable suspicion that the defendant was engaging in criminal activity. *Id.* at 410. In *State v. Grantham*, 146 Idaho 490 (Ct. App. 2008), the defendant was asked by an officer if she had marijuana. *Id.* at. 494. The defendant then made eye contact with the officer and denied having any marijuana. *Id.* The officer then asked the defendant if she had any methamphetamine and the defendant "turned away, avoided eye contact, and did not answer." *Id.* The Idaho Court of Appeals held that a factor which supported the

determination that reasonable suspicion existed was the fact that the defendant's "demeanor changed visibly when asked whether there was methamphetamine in the car as compared to other drugs." *Id.* at 497.

In this case, Mr. Mathews displayed behaviors which were the opposite of the defendant's in the foregoing cases and consistent with the behavior of an innocent individual. In *Nevarez*, the Court of Appeals held nervousness and evasive behavior is suspicious. *Nevarez*, 147 Idaho at 475-476. Here, Mr. Mathews was neither nervous nor evasive. (Tr., p.61, Ls.12-19.) In *Troughton*, it was held that hiding one's face from police is suspicious. *Troughton*, 126 Idaho at 410. In this case, Mr. Mathews looked the officer directly in the eye the exact opposite of hiding his face. (Tr., p.61, L.19-62, L.3.) In *Grantham*, suspicious behavior was found when the defendant made eye contact when asked about marijuana, but looked away when asked about methamphetamine. *Grantham*, 146 Idaho at 494-497. It is important to note, that the *Grantham* Court did not find it suspicious for the defendant to look the officer in the eye when asked about marijuana. *Id.* Suspicious behavior was only found when the defendant looked away from the officer when subsequently asked about methamphetamine. *Id.* Here, Mr. Mathews was not nervous and did not display any evasive behavior when he looked Officer Bingham in the eye and denied having drugs. As such, Mr. Mathews' behavior when asked incriminating questions was the opposite of behavior the Idaho Court of Appeals has held suspicious.

A holding that Mr. Mathews' behavior was suspicious would create precedent where any reaction in response to an incriminating question by law enforcement would create suspicion. Thus, a bright-line rule allowing officers to detain a car until a drug

dog could "search" would be established so long as police ask an incriminating question. As argued above, Mr. Mathews' behavior was the opposite of the behavior in the foregoing cases which was determined suspicious. If both evasive behavior or the lack of evasive behavior can be construed as suspicious then every time a person is asked an incriminating question by law enforcement the response would always be construed as suspicious. The unreasonableness of such a holding would be compounded by the district court's conclusion, *supra*, that being present in an area not known for drug trafficking is suspicious. Such a double sided rule would run afoul the rule which precludes suspicion to be found for conduct that can be described as normal behavior. *Roe*, 140 Idaho 180.

The Court of Appeals disagreed with the foregoing argument, and pointed to some federal cases where the opposite factors were presented and then held that the specific finding that a factor is suspicious or not suspicious is not important because the rule being applied is that observations that appear inconsistent with an individual's story indicate that the story may be untrue. (Opinion, p.6.) While Mr. Mathews generally agrees with the Court of Appeals, there are some factors, such as a lack of nervousness and evasion, which are generally factors that cut against a holding that reasonable suspicion existed. Moreover, in the context of this case, Mr. Mathews' calm behavior in combination a lack of facts indicating he was using drugs, and the fact he was pulled over for speeding, were not suspicious. Moreover, district court's and the Court of Appeals' conclusion that Mr. Mathews' calm behavior was suspicious because it seemed rehearsed or a "staged performance" (Opinion, p.5) is at odds with both courts' conclusion that his lack of an explanation for his circuitous route through Idaho

and decision to gamble in a gas station in western Nevada was also suspicious. (Opinion, pp.6-7.) If Mr. Mathews' response to Officer Bingham's incriminating questions were suspicious because they were so well rehearsed, then it defies logic to conclude that his lack of a rehearsed answer to basic questions were suspicious. Either Mr. Mathews was a calm well rehearsed drug trafficker or he was not. But the narrative provided by Officer Bingham and accepted by both the district court and the Court of Appeals considered him well rehearsed for the finding of suspicion as to one fact and his lack of rehearsed answers to another set of questions suspicious.

The third factor identified by the district court was the food wrappers and the energy drinks which, according to the court, created a "lived in" look indicating that Mr. Mathews was in a hurry. (R., p.84.) The fourth factor identified by the district court was the map of Idaho, which was associated with drug activity as drug traffickers prefer paper maps because GPS systems require destination information. (R., p.84.)

As a preliminary note, the Court of Appeals did not analyze the third factor, and implicitly held that the presence of food wrappers and empty energy drinks in Mr. Mathews' car was not suspicious and consistent with his claim that he was on a long distance road trip. (Opinion, p.5.)

The district court's reliance on these two factors is misplaced as neither of them were unique to Mr. Mathews and they were entirely consistent with his statement that he was on a long road trip. Moreover, there is nothing unusual or suspicious about a person on a long road trip having a messy car and an open map. There is persuasive authority holding as such. For example, in overturning a court's finding of reasonable suspicion, the 10th Circuit employed the following rationale in determining that the

presence of open maps and fast food wrappers are not factors which give rise to reasonable suspicion:

> The district court also concluded that the presence of fast-food wrappers and open maps in the passenger compartment contributed to a finding that reasonable suspicion existed. [The defendant] informed the trooper of his travel itinerary—a cross-country trip through parts of the country he had not seen before. The presence of open maps in the passenger compartment is not only consistent with his explanation, but is entirely consistent with innocent travel such that, in the absence of contradictory information, it cannot reasonably be said to give rise to suspicion of criminal activity. *See Karnes v. Skrutski,* 62 F.3d 485, 495 (3d Cir.1995). Remnants from fast-food restaurants can probably be found on the floor of many cars traveling the interstate highways, including many traveling eastbound on Interstate 70. *See id.* at 496 (Fast-food wrappers "have become ubiquitous in modern interstate travel and do not serve to separate the suspicious from the innocent traveler."). The possession of open maps and the vestiges of fast-food meals describes a very large category of presumably innocent travelers, and any suspicion associated with these items is virtually nonexistent.

United States v. Wood, 106 F.3d 942 (10th Cir. 1997) (citation omitted); *see also U.S. v. Farias,* 43 F.Supp.2d 1276, 1283 (D. Utah 1999) (holding that the "presence of a road atlas and fast food wrappers" in defendants' vehicle, which were consistent with the defendant's explanation of traveling on a long road trip, are not factors which contribute to a finding of reasonable suspicion); *State v. Richmond*, 133 S.W.3d 576,580-581 (Mo. App. S.D., 2004) (holding that defendant's nervousness, food containers, beverage containers, an atlas in the passenger compartment, and the defendant's claim he was traveling from Los Angeles to Michigan, did not support the officer's belief that criminal activity was afoot); *Meraz-Lopez v. State,* 92 Ark. App. 157, 160-161 (Ark. App. 2005) (holding that nervousness combined with "[t]he presence of a brand new cellular telephone, new atlases, fast food, and energy drinks scattered in the front are seemingly innocent."). During cross-examination, Officer Bingham even testified that

energy drinks, food wrappers and water bottles are quite common possessions for innocent individuals driving across the country. (Tr., p.92, L.19 - p.92, L.7.)

Additionally, the credibility of Officer Bingham's assertion that drug traffickers prefer paper maps over GPS systems is suspect. While Officer Bingham did testify that in his training drug traffickers prefer paper maps (Tr., p.22, L.9 - p.23, L.10), he never provided any information indicating that in his experience he has arrested any drug traffickers using paper maps to navigate. As such, Officer Bingham never testified that he had first-hand experience with arresting drug traffickers that use paper maps. Officer Bingham did testify that "a lot of people use GPS" systems. (Tr., p.22, Ls.3-9.) However, the mere assertion that a lot of people use GPS systems does not distinguish Mr. Mathews' driving behavior from the rest of the population because it does not establish that the majority of the population uses GPS systems. As such, Officer Bingham's testimony that a lot of people use GPS systems did not go far enough to establish that people on long road trips in possession of paper maps are drug traffickers.

As mentioned above, the conclusion that Mr. Mathews' food wrappers travel plans were suspicions is further belied when Officer Bingham's rationale is analyzed. Officer Bingham testified that the energy drinks and the food wrappers were suspicious because they indicate that Mr. Mathews was in a hurry to get somewhere and drug traffickers try to hurry when traveling to reduce the odds of interacting with law enforcement. (Tr., p.103, L.8 - p.104, L.10.) If Mr. Mathews was in a hurry to get home, it makes little sense for him to take a detour from the direct route to Kansas. The logic of Officer Bingham breaks down further because the original reason for the stop was

speeding. If a drug trafficker is willing to take long detours and avoid stopping to eat to avoid interactions with law enforcement, it makes little sense for that person to undermine all those precautions by breaking a simple law like speeding which significantly increases the odds of interacting with law enforcement. *See Nevarez*, 147 Idaho at 475-476. (holding that driving well below the speed limit is suspicious because it is a means to avoid contact with law enforcement).

Considering the totality of the circumstances, the district court and the Court of Appeals' erred when they determined that reasonable suspicion existed to extend Mr. Mathews' stop. Mr. Mathews' behavior when interacting with Officer Bingham was normal behavior. The items located in Mr. Mathews' car were normal and consistent with his travel plans. Moreover, the factors relied on by the district court and the Court of Appeals are all internally inconsistent. For the purposes of finding the that paper atlas, the food wrappers, and Mr. Mathews' travel plans were suspicious it was held that those factors indicated that Mr. Mathews' was avoiding law enforcement. However, that determination is undermined by the fact that Mr. Mathews was pulled over speeding and was clearly not concerned about avoiding law enforcement. The other major factor considered suspicious was Mr. Mathews' "rehearsed" response to Officer Bingham's incriminating questions. However, that factor is inconsistent with the finding that it was suspicious for Mr. Mathews' failure to provide a clear explanation as to his activities in Nevada. If Mr. Mathews was a rehearsed drug trafficker, then he would have also had a rehearsed set of answer as to his travel plans. Furthermore, it would be easier for Mr. Mathews to have a set of rehearsed travel plans than to act rehearsed when speaking with law enforcement. As such, there district court and the court of Appeals

erred when they determined that reasonable suspicion existed to extend the stop in order for a drug dog to arrive at the scene.

In sum, this Court should grant review because both the district court and the Court of Appeals' holdings in this matter are inconsistent with this Court's holding in *Morgan*, *supra*. Additionally, the Court of Appeals has held that it was reasonable for Officer Bingham to make up an incriminating reason why Mr. Mathews' was in Idaho and then held that the Officer's belief was reasonable because Mr. Mathews had not provided him with an explanation for being in Idaho. Such a holding abrogates the constitutional standard that for suspicion to be deemed reasonable it must be supported by articulable facts. Additionally, the Court of Appeals holding in this matter is inconsistent with prior Court of Appeals precedent which holds that a calm demeanor is not suspicious and presence in a high crime area is suspicious. As such, every factor associated with a stop can be used to establish reasonable suspicion, which unhinges that legal determination from case law.

CONCLUSION

Mr. Mathews respectfully requests that this Court grant review. In the event this Court grants review, Mr. Mathews respectfully requests that this Court reverse the district court's order denying his motion to suppress and remand this case to the district court for further proceedings.

DATED this 11th day of March, 2014.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of March, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JONATHAN ROSS MATHEWS
INMATE #105898
SICI
PO BOX 8509
BOISE ID 83707

G RICHARD BEVAN
DISTRICT COURT JUDGE
E-MAILED BRIEF

GEORGE P ESSMA
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand deliver to Attorney General's mailbox at Supreme Court

EVAN A. SMITH
Administrative Assistant

SFW/eas